

Judging the Expert

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Judge Higginbotham called it one of the most "vexing problems currently facing the federal courts."¹ He was addressing the role of experts in federal litigation and the role of the trial judge in judging the expert. Nearly every trial judge, state or federal, has faced the problem of whether or not to allow an expert to express an opinion. The use of experts has proliferated beyond belief. There are experts on every conceivable subject, some of whom advertise in the legal periodicals and others who find the proper expert for you. The judge often is faced with the fairly obvious conclusion that this so-called expert is really "anybody's dog that will hunt." As a result of the great increase in product liability, medical malpractice, and toxic tort litigation, the use and availability of experts has multiplied. Undoubtedly, there are among them some intellectual prostitutes.²

There are attendant social and economic costs that should concern the trial judge. The existence of "junk scientists"³ and partisan "hired guns" discourages the participation of serious scientists in the process. Potentially useful drugs and products can be withheld from production and sale because of adverse judgments. Risk-allocation costs can add substantially to the cost of products to the consumer. Litigation costs and judgments can prove fatal to corporations long after the alleged egregious tortious act takes place.⁴

It is not a new problem, as the Supreme Court noted in 1858: "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount"⁵

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¹ *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167, 168 (5th Cir. 1989) (Higginbotham, J., concurring in dissent), *cert. denied*, 494 U.S. 1046 (1990).

² See generally Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986). "[E]xpert witnesses are not necessarily always unbiased scientists. They are paid by one side for their testimony. . . . [T]he potential for exaggeration and fraud on the court is present and may be impossible to discover without close inspection and careful consideration of the record." *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1352-53 (6th Cir.), *cert. denied*, 113 S. Ct. 84 (1992).

³ The term "junk science" was popularized by Peter W. Huber. See PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

⁴ See Barry M. Epstein & Marc S. Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 661-63 (1987).

⁵ *Winans v. New York & E.R.R.*, 62 U.S. 88, 101 (1858).

The trial judge is faced with a philosophical dichotomy. The conservative/passive judge, who views her role as that of a referee in a jury trial, and who believes that the adversary process will refine the truth, will allow expert testimony for what it is worth, leaving to the lawyers on cross-examination and in counter-expert testimony to attack its weight.⁶ The activist/interventionist judge, who feels obligated to "find the truth" and spare the jury from misleading, confusing testimony bearing an "aura" of reliability, will evaluate and rule on the qualifications and reliability of an expert's testimony as a question of admissibility. The latter seems to be the trend in recent years, although characterized as "disturbing" by some scholars.⁷

THE GATEKEEPER'S JOB

The job of choosing between diametrically opposite expert opinions is an almost impossible task for jurors, and judges are not very well qualified for the task either. Learned Hand observed over ninety years ago:

The whole object of the expert is to tell the jury . . . general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.⁸

Nevertheless, if trial judges did not have it already, the "gatekeeper's" job has been cast upon them in the federal system by the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁹ Before *Daubert*, the *Frye* test¹⁰ was the majority rule and the rule in the Sixth

⁶ See, e.g., *Mannino v. International Mfg. Co.*, 650 F.2d 846, 853 (6th Cir. 1981); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

⁷ See, e.g., Troyen A. Brennan, *Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 U. PITT. L. REV. 1, 9 n.40 (1989).

⁸ Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901); see also *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1534 (D.C. Cir.) (stating that "[j]udges . . . have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease"), *cert. denied*, 469 U.S. 1062 (1984).

⁹ 113 S. Ct. 2786 (1993).

¹⁰ See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Circuit. Under this test, the admissibility of scientific evidence depended upon whether it was based on scientific principles that were sufficiently established to have gained general acceptance in the particular field in which it belonged. The Sixth Circuit took *Frye* one step further and required that the expert's opinion or deduction itself be in "conformity to a generally accepted explanatory theory."¹¹

In *Daubert*, a unanimous Supreme Court held that Rule 702 of the Federal Rules of Evidence had superseded the *Frye* test and that it is no longer a precondition to admissibility in federal litigation for an expert's opinion to be based on scientific principles that have gained general acceptance in the relevant scientific community. A seven member majority then offered some advice to the trial judges on how to exercise their discretion as the gatekeepers. Judges are directed to use Rule 104 of the Federal Rules of Evidence and hear testimony out of the presence of the jury on "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."¹² The judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."¹³ The majority expressed confidence "that federal judges possess the capacity to undertake this review."¹⁴

Chief Justice Rehnquist, joined by Justice Stevens, expressed confidence in the federal judiciary as well; however, he also confessed doubt that Rule 702 conferred either the obligation or the authority upon federal trial judges to become "amateur scientists" in order to perform that role.¹⁵ To "obligation" and "authority," one should add "capacity." Are judges really up to the task of understanding esoteric scientific testimony in the first place, and then distinguishing between what is good and bad science?

¹¹ *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977). This distinction was pointed out by Judge Guy in his dissent in *United States v. Kozminski*, 821 F.2d 1186, 1217 (6th Cir. 1987) (Guy, J., dissenting), *aff'd*, 487 U.S. 931 (1988). He noted that the court was focusing on the deduction rather than the methodology by which the deduction was made. Judge Guy's distinction was more consonant with Federal Rule of Evidence 703, as well. The Rule refers to "facts or data" upon which an "opinion or inference" is based as being those reasonably relied upon by experts in the field.

¹² *Daubert*, 113 S. Ct. at 2796.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2800 (Rehnquist, C.J., concurring in part and dissenting in part).

THE JUDGES' DILEMMA

How does the judge perform this gatekeeper role? In what principled way shall the expert be judged? First, I suggest, any judge's dilemma is an advocate's opportunity. As is the case in every similar situation, the judge will be dependent upon good lawyers to spell out the issues, suggest the parameters, and urge the conclusion. Justice Blackmun and the *Daubert* majority make some "observations" of some of the "[m]any factors [that] will bear on the inquiry":¹⁶ (1) Has the purported scientific knowledge been or can it be tested? (2) Has it been subjected to peer review? (3) What is the potential rate of error? and (4) How much acceptance does it have within the relevant scientific community?¹⁷ Judges then are reminded to consider Rules 703, 706, and 403 of the Federal Rules of Evidence. Rule 703 requires that if opinions are based upon inadmissible facts or data, these data or facts must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."¹⁸ Rule 706 allows the appointment of the court's own expert, and Rule 403 is the balancing rule of probative value versus unfair prejudice. The *Daubert* majority also encourages the use of Rule 50(a) of the Federal Rules of Civil Procedure to direct judgment, the use of Rule 56 to grant summary judgment, and the use of the authority of the trial court, as well as of the appellate court, to reverse a jury verdict based upon insufficient evidence.¹⁹ The Court adds a caveat, reminding the judge not to confuse the role of judge and jury by forgetting that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [rather than exclusion] are the traditional and appropriate means of attacking shaky but admissible evidence."²⁰

These observations and suggestions might also include: (5) Is the underlying data untrustworthy for hearsay or other reasons?²¹ and (6) How

¹⁶ *Id.* at 2796.

¹⁷ *Id.* at 2796-97. Each of the four *Daubert* factors is carefully considered in relation to the acceptance of DNA evidence in *United States v. Chischilly*, 30 F.3d 1144, 1152-56 (9th Cir.), *cert denied*, No. 94-7206, 1995 WL 21655 (U.S. Jan. 23, 1995).

¹⁸ FED R. EVID. 703.

¹⁹ *Daubert*, 113 S. Ct. at 2798.

²⁰ *Id.*

²¹ See *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied sub nom. Lombardi v. Dow Chem. Co.*, 487 U.S. 1234 (1988). District Court Judge Weinstein found the opinions of two experts who had partially based their opinions on hearsay questionnaires to the plaintiffs to be hearsay and unreliable. *Id.* at 1245-48. He also

far out is it? This approach is another way of looking at the "relevant scientific community" question posed by *Daubert*. It is also the *Frye* test without being "fried." Although the *Frye* test is no longer controlling, it is still highly relevant. Judge Weinstein articulated the issue well in *In re "Agent Orange" Product Liability Litigation*:²² "When either the expert's qualifications or his testimony lie at the periphery of what the scientific community considers acceptable, special care should be exercised in evaluating the reliability and probative worth of the proffered testimony under Rules 703 and 403." The opinion of the leading professional societies about the specialty of the alleged expert should bear heavily on this question. In *Sterling v. Velsicol Chemical Corp.*,²³ Judge Guy rejected a "clinical ecologist's" testimony because, *inter alia*, "[t]he leading professional societies in the specialty of allergy and immunology, the American Academy of Allergy and Immunology (AAAAI) and the California Medical Association (CMA), have rejected clinical ecology as an unproven methodology lacking any scientific basis in either fact or theory."

Finally, the experience and common sense of the judge come into play.²⁴ The gatekeeper's role boils down to assessing reliability and credibility, in fairness to both sides, with a healthy respect for the traditional function of the jury.

RAISING THE QUESTION

In a civil case, the issue of the admissibility of expert testimony should be raised as soon as it appears pretrial. In 1993, Rule 26(a)(2) was added to the Federal Rules of Civil Procedure. It offers an inexpensive and effective way to test the admissibility of questionable expert testimony very

took judicial notice "that no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their afflictions." *Id.* at 1246.

The "survey method" is also relied upon by experts purporting to testify as to valuation of "hedonic damages," the loss of the ability to enjoy life. In this method, individuals are asked to state what they would be willing to pay to reduce their chance of dying by a specified percentage. The unreliability of such a survey, in addition to its hearsay character, is compounded by the apparent impossibility of an honest answer to the question. If asked the amount one would be willing to accept to voluntarily depart this life, it seems that the answers received would be a joke. See the author's opinion in *Hein v. Merck & Co.*, No. 3-93-0541, 1994 WL 661834 (M.D. Tenn. Nov. 22, 1994).

²² *Agent Orange*, 611 F. Supp. at 1242.

²³ 855 F.2d 1188, 1208 (6th Cir. 1988).

²⁴ *Agent Orange*, 611 F. Supp. at 1246.

early in the process. This new rule requires the automatic disclosure of the identity of any person who may be used to present expert testimony at trial. The disclosure must include a written report prepared and signed by the witness that contains a "complete statement of all opinions to be expressed and the basis and reasons therefor."²⁵ The report also must contain the data or other information considered in forming the opinion, as well as other information regarding the expert's qualifications. At the initial case management conference held under Rule 16 and the Civil Justice Reform Act²⁶ plan in the particular district, counsel should insist upon early disclosure of experts as part of the plan.

When a party receives a Rule 26 disclosure statement and believes that the testimony does not meet the requirements of *Daubert*, that party can file a motion *in limine* attacking the proffered testimony or the expert's qualifications. In a recent case before the United States District Court of the Middle District of Tennessee,²⁷ the plaintiff proposed to use an expert from California on "hedonic damages." A Rule 26 disclosure statement had been supplied. To avoid the expense of traveling to California to take the alleged expert's deposition or bringing the expert to Tennessee for trial and a Rule 104 hearing during trial, the defendant filed a motion *in limine* with the Rule 26 statement attached. Based on the motion and accompanying statement, the court determined that the proffered testimony was unreliable and inadmissible.²⁸ The case subsequently settled.

Another valuable pretrial tool is to file a motion for summary judgment or partial summary judgment on those claims or defenses that are based upon questionable expert testimony. After the Rule 26 disclosure statement has been filed or the proffered expert has been deposed, the opposing party can assemble counter proof to form the basis of a summary judgment motion. A party can file an opposing expert's affidavits, Rule 26 statements, and depositions to demonstrate the "off-the-wall" nature of the questioned testimony and its failure to meet the *Daubert* standards. Such a pretrial filing allows the court to make an early determination of the question. The test is whether the evidence supporting the expert's position is insufficient to allow reasonable jurors to conclude that the position is more likely true than not.²⁹

²⁵ FED. R. CIV. P. 26(a)(2)(B).

²⁶ 28 U.S.C. §§ 471-482 (Supp. V 1993).

²⁷ *Hein v. Merck & Co.*, No. 3-93-0541, 1994 WL 661834 (M.D. Tenn. Nov. 22, 1994).

²⁸ *Id.* at *5.

²⁹ See *Glaser v. Thompson Medical Co.*, 32 F.3d 969, 976 (6th Cir. 1994). In this case, the district court had granted summary judgment to the defendant. In a two-

In *Daubert*, the Court recommended the use of Federal Rule of Evidence 104(a) to make this determination.³⁰ A hearing, usually out of the presence of the jury, may be held either pretrial on a motion *in limine*³¹ or during the trial when the expert is proffered.³² In criminal trials, a party most often will raise the issue during the trial and request a Rule 104 hearing,³³ although the issue could also be raised pretrial by a motion *in limine*.³⁴ The issue also may be addressed in a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) at the conclusion of the proof of an adversary,³⁵ or by motion for judgment notwithstanding the verdict under Rule 50(b).³⁶

to-one opinion, the majority of the Sixth Circuit panel applied the *Daubert* factors and found the expert testimony sufficiently methodologically valid and supported to create a material issue of disputed fact, and reversed and remanded for trial. The dissent applied the *Daubert* factors and reached the opposite conclusion.

Other recent cases reviewing grant of summary judgment and applying *Daubert* factors include *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 24-25 (2d Cir. 1994); *Conde v. Velsicol Chemical Corp.*, 24 F.3d 809, 812-14 (6th Cir. 1994); *Hayes v. Raytheon Co.*, 23 F.3d 410, No. 92-4004, 1994 WL 143000 (7th Cir. Apr. 21, 1994); *Sorensen ex rel. Dunbar v. Shaklee Corp.*, 31 F.3d 638, 645-51 (8th Cir. 1994); and *Claar v. Burlington Northern Railroad*, 29 F.3d 499, 500-03 (9th Cir. 1994).

³⁰ *Daubert*, 113 S. Ct. at 2796.

³¹ A five-day pretrial hearing was held in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 732 (3d Cir. 1994), and the expert testimony was excluded by the trial judge, *id.* at 732, and then reviewed in a lengthy opinion by Judge Becker of the Third Circuit, affirming on some issues and reversing and remanding on others, *id.* at 798-99. Judge Becker introduced a new twist to the review of such decisions. Instead of the deference of "clearly erroneous" or "manifestly erroneous" abuse of discretion standards other courts have applied, Judge Becker said review requires a "hard look" to insure that the district court's exercise of discretion was sound and that it correctly applied the *Daubert* factors. *Id.* at 749-50. See *infra* the discussion of standards of review. See also *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993) (involving pretrial exclusion of expert testimony on motion *in limine*).

³² Cf. *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994).

³³ See *United States v. Bonds*, 12 F.3d 540, 551 (6th Cir. 1993).

³⁴ See *United States v. Rincon*, 28 F.3d 921, 922 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3421 (U.S. Nov. 28, 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir.), *denial of post-conviction relief aff'd*, 15 F.3d 1216 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 2714 (1994).

³⁵ See *Thomas v. American Cyanamid Co.*, No. 91-5326, 1993 WL 369129, at *1 (6th Cir. Sept. 21, 1993) (per curiam).

³⁶ See *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 311-15 (5th Cir. 1989), *cited with approval in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113

THE STANDARD OF REVIEW

The decision of the judge made during trial to admit or exclude evidence generally is said to be broadly discretionary. It is reviewed under an abuse of discretion standard and is reversible only if "manifestly erroneous."³⁷ This standard also applies to the case of a pretrial motion *in limine* in which witnesses are heard.³⁸ However, Judge Becker of the Third Circuit has added his own supervisory gloss to the Federal Rules of Civil Procedure and the case law on this subject. He says that, instead of an abuse of discretion standard, in view of the "enormous power of the district court to foreclose submission of a party's case to a jury, . . . the review requires a 'hard look' to insure that the district court's exercise of discretion was sound and that it correctly applied the several *Daubert* factors."³⁹ This creation of a new and higher standard of review appears to be without authority or precedent. It has not been followed by any other circuit as of this writing.

Review of the grant of summary judgment based upon analysis of plaintiff's expert proof under *Daubert* is plenary and de novo.⁴⁰

S. Ct. 2786, 2798 (1993); *cf.* *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993).

³⁷ *Cf.* *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993) (holding that district court had broad discretion to admit expert testimony and using a "manifestly erroneous" standard of review), *cert. denied sub nom. Gotti v. United States*, 114 S. Ct. 1645 (1994); *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir. 1994) (applying the abuse of discretion standard); *United States v. Bonds*, 12 F.3d 540, 556 (6th Cir. 1993) (affirming trial court's admission of evidence by holding that findings of district court with regard to general acceptance of expert testimony were not clearly erroneous); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1014 (6th Cir. 1993) (holding that "trial court has broad discretion in admitting and excluding expert testimony, and [the court of appeals] will sustain the trial court's action unless it is manifestly erroneous").

³⁸ *See Fusco v. General Motors Corp.*, 11 F.3d 259, 264 (1st Cir. 1993) (holding that trial court had broad discretion to exclude demonstrative evidence intended to be illustrative of scientific principles and affirming exclusion). Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

³⁹ *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 733 (3d Cir. 1994); *see also id.* at 749-50.

⁴⁰ *Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 812 (6th Cir. 1994); *Hayes v. Raytheon Co.*, 23 F.3d 410, No. 92-4004, 1994 WL 143000, at *2 (7th Cir. Apr. 21, 1994); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993).

CONCLUSION

The gatekeeper's role is a challenge to the federal trial judge. However, it is both a challenge and an opportunity to the lawyer. The opportunity to keep out potentially damaging testimony or the opportunity to try to get in marginally admissible but potentially very helpful testimony is the essence of good lawyering. These opportunities also will be grist for the scholarly mill. Only one year after its rendition, there are 103 circuit court opinions and 120 district court opinions on Westlaw that cite *Daubert*. Difficult as it may be to apply in some instances, the *Daubert* standard of admissibility is more flexible and far superior to the *Frye* rule.

